IN THE

Supreme Court of the United States

October Term, 1951.
No.....

WESTERN AIR LINES, INC.,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee.

Brief of Appellant Under Rule 12(3) in Opposition to Appellee's Motion to Dismiss or Affirm Included in Statement Against Jurisdiction.

Preliminary Statement.

The basic point that this Court is asked to decide is the extent to which, if at all, states have the power to exercise any control over interstate air carriers serving the public. The question is easy to state but the answer is not simple. Only this Court can shed light on the somewhat confused status of the law.

Appellee rests its motion to dismiss the appeal or affirm the orders of the California Supreme Court on the single ground that no substantial federal question is presented by the appeal.

Appellant believes that the answer of this Court to the basic question should be that the states have no control

over the interstate or intrastate operations, safety or economics of commercial air carriers. But an unwanted answer is better than no answer. Accordingly, the mission of this brief will be to show that the basic question must be answered, thus demonstrating that it is substantial, rather than placing emphasis on what the answer should be. That will come later.

I.

The Basic Question Involved Is Substantial.

A. Uncertainty Exists With Respect to the Extent of the Power, if Any, Which States May Exercise Over Air Carriers.

The very existence of this proceeding exposes the confusion that prevails over the issue of state control versus Federal control of commercial air carriers.

The record discloses that Appellant increased its air-coach tariff between Los Angeles and San Francisco, California, from $9.95 to $11.70, effective March 1, 1951, pursuant to the request of the Civil Aeronautics Board and in compliance with the Civil Aeronautics Act. The order of Appellee which is being challenged approved the increase effective May 9, 1951, rather than March 1, 1951, and ordered restitution wherever possible of the excess between $9.95 and the $11.70 charged by Appellant between March 1 and May 9, 1951.

If the Civil Aeronautics Board under the Civil Aeronautics Act has control over the tariffs charged by Appellant for carrying passengers between intrastate points on its interstate routes, Appellant would be subject to the criminal penalties of Section 902 of the Civil Aeronautics Act (49 U. S. Code 622) if it made a single refund in response to Appellee's order. If Appellee's order

be valid and Appellant should fail to make restitution wherever possible of the "excess" tariff charged, Appellant may be subject to a penalty of not less than $500.00 nor more than $2,000.00 for each offense, imposition of which penalty is threatened by Appellee in unveiled language appearing in its order.

It is not right that Appellant should have to undertake the burden of determining which putative master it should obey, and speculating on which, if either, might be disinclined to exact the penalty for disobedience. Even though Appellant were to choose wisely in this instance, if left to its own devises, the confusion would not be removed. Appellant, along with all other air carriers similarily situated, will not know which order to fulfill and which order to reject as conflicting orders arise in the future.

Although the specific point here in dispute involves only the question of control over passenger tariffs charged by an air carrier for the transportation of persons between intrastate points on an interstate air route, the basic question at issue involves much more and connotes grave disruptions to the economic welfare of the American flag air transportation industry.

Appellee seems to concede without too much reluctance, possibly because resistance would be quite futile, that the states have no right to interfere with *safety* matters concerning air carriers. But Appellee insists that neither the Civil Aeronautics Act nor the commerce clause of the Federal Constitution imposes a barrier against complete control by the states relating to the intrastate operations of air carriers from the standpoint of *economic* matters.

Economic regulation is by no means limited to controlling tariffs. Economic matters, as distinguished from safety matters, in air transportation include the issuance,

modification and abandonment of Certificates of Convenience and Necessity (49 U. S. Code 482). They include the rates to be paid by the Post Office Department for the carriage of mail by air (49 U. S. Code 486). They include the type of reports to be filed, disclosure of stock ownership, form of accounts and inspection of accounts and property (49 U. S. Code 487). They also include matters relating to consolidations, mergers and acquisitions of control (49 U. S. Code 488), interlocking relationships (49 U. S. Code 489), and pooling agreements (49 U. S. Code 492), without exhausting all of them.

If the Civil Aeronautics Act and the commerce clause do not prohibit the states from controlling passenger tariffs charged by air carriers for transportation between intrastate points on interstate routes, there would be no prohibition against state control of Certificates of Convenience and Necessity covering intrastate segments. If the State of California acting through Appellee have the power to grant or deny to Appellant a Certificate of Public Convenience and Necessity to operate between Los Angeles and San Francisco, California, that would include the power to block effective issuance by the Civil Aeronautics Board of an interstate air route between Los Angeles, California, and Seattle, Washington, via Oakland and San Francisco, California, and Portland, Oregon, which represents Appellant's Certificate of Convenience and Necessity for Route 63 issued by the Civil Aeronautics Board. Lacking the full strength of the Los Angeles-San Francisco intrastate segment, the Los Angeles-Seattle interstate route would provide but little public service.

If the State of California acting through Appellee have the power to block a merger of Appellant with some other air carrier because the merger would involve Appellant's

operation between Los Angeles and San Francisco, the Civil Aeronautics Board's control over mergers of air carriers would be stultified, if not nullified.

It is not known, and has not been known since the Civil Aeronautics Act was passed in 1938, with any degree of certainty the extent to which, if at all, the various states have control over these economic matters which are so important to the welfare of the air transportation industry. The basic question involved on this appeal concerns these matters and the answer pronounced by this Court will remove the uncertainties.

B. Dual Control of the Airline Industry Would Be Disruptive.

It is not to be denied that conflicting orders addressed to an air carrier by separate agencies with neither agency having authoritative primacy would create an untenable and intolerable condition in the air transportation industry. This is so whether the conflicting orders concern safety, and therefore involve lives, or concern economic matters, and therefore involve only dollars. Indeed, the latter would have a direct impact on the efficiency of the carrier's operation, and if allowed to continue an inefficient operation will become a dangerous operation.

It is no answer to say, as Appellee has said, that a state agency is as duty-bound to fix just and reasonable intrastate fares as is the Civil Aeronautics Board duty-bound to fix just and reasonable interstate fares, and that there are adequate administrative and judicial remedies should either governmental regulatory agency become remiss in its duty.

A state agency in the highest good faith might consider an intrastate air tariff of 2¢ a mile just and reasonable and the highest court of that state in like good

faith might agree. Should the Civil Aeronautics Board in the highest good faith conclude that 6¢ a mile[1] is a reasonable rate and should this Court agree, a high block would be placed in the road of an efficient operation by the air carriers directly concerned. Nor would it matter that both courts acting independently were to rule that the state order applied only to intrastate traffic and the Federal order only to interstate traffic. Even though it were possible to screen out intrastate passengers and to prevent interstate passengers from making the trip by segments on separately purchased segment tickets, an impossible situation would exist if a Los Angeles-Seattle passenger had to pay three times as much to fly over the Los Angeles-San Francisco segment of his interstate flight as the Los Angeles-San Francisco passenger would pay for his intrastate flight. If this were multiplied by the number of times that the same situation could exist, should all forty-eight states exercise similar power in like fashion, the impact on the air transportation industry would not be responsive to the public interest.

Dual control over air tariffs would prevent the maintenance of a uniform national rate structure and could lead to direct violation of Section 404(b) of the Civil Aeronautics Act (49 U. S. Code 484), which reads:

> "No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference

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[1]The prevailing first-class air passenger rate nationally averages approximately 6¢ per mile.

> or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Appellee will argue that this section of the Act refers only to "air transportation" and that this term is defined in Section 1(10) (49 U. S. Code 401), to mean interstate, overseas or foreign air transportation or the transportation of mail by aircraft, and thus that the anti-discrimination provision was not intended by Congress to apply to intrastate matters.

Such an argument would do little credit to the intelligence of Congress. If a person who travels by air between Los Angeles and San Francisco is not a person within the meaning of that section, or if Los Angeles and San Francisco are not ports, and the intervening area a locality within the meaning of the section, and if the traffic between Los Angeles and San Francisco does not come within the purview of any "description of traffic in air transportation" the section will be of little value in maintaining reasonable standards in the air transportation industry. And although San Francisco-Los Angeles may be the most important intrastate air segments in the United States, it is by no means the only one.

C. Dual Control Would Divest the Board of Its Air Mail Rate Authority.

Perhaps the most important element which exposes the substantial nature of the basic question raised by this appeal concerns air mail rates.

Section 406(a) of the Act (49 U. S. Code 486), directs the Board to fix and determine the fair and reasonable rates of compensation for the transportation of mail by aircraft. Section 406(b) sets forth the factors which the Board shall take into consideration in determining the mail rate in each case, including:

> ". . . the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, *together with all other revenue of the air carrier,*[2] to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

The term "all other revenue" is not all-embracing, as it does not include income from matters not directly related to the carriers' air transportation operations, but

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[2]Emphasis in quoted material added throughout unless otherwise noted.

manifestly it does include tariff derived from the carriage of persons and property between points within a single state.

If the several states have control of intrastate air tariffs the various state agencies and not the Civil Aeronautics Board necessarily will become the final arbitrators of what rate the Post Office Department must pay for the carriage of mail. This cannot be disputed, nor can it be cast aside with the bland declaration that each state would be duty-bound to fix just and reasonable intrastate tariffs.

If a particular state agency, being concerned largely with its own citizens, determine that intrastate tariffs should be less per mile than the standard interstate tariff approved by the Civil Aeronautics Board, necessarily every air carrier operating intrastate segments within that state would derive less passenger revenue than would be the case otherwise, with the result that the Board would be under compulsion to offset the diminished passenger revenue from intrastate tariffs by increasing the mail rate. Congress could not have intended this to be so.

That the basic question involved on this appeal is substantial and of great importance to the air transportation industry is scarcely open to fair challenge. It remains only to be seen whether there is merit to the points of law which will be urged by Appellant in support of the answer Appellant believes to be legally correct.

II.

The Legal Points Which Will Be Urged by Appellant Have Merit.

A. Preface.

Appellant concedes that no matter how important the question involved may be to it and to the air transportation industry, Appellee's motion to dismiss or affirm would be in order unless the legal principles to be urged in support of the answer sought by Appellant have merit. Since it is thought that the need for this brief is simply to reveal that the main question is substantial and that the supporting legal points have real merit, the effort will not necessarily be made to present the law under color of finality. That will be done in the brief which will be filed under Rule 27.

The basic point urged by Appellant is that the states have no power to interfere with the operations of air carriers, either with respect to safety matters or economic matters. This basic point splits into two—(1) by the Civil Aeronautics Act the Congress has preempted the field, and (2), if that be not so, the commerce clause of the United States Constitution of itself bars interference by the states.

It is axiomatic that under our system the Federal Government has exclusive control of matters pertaining to interstate commerce, with the states retaining exclusive control of local matters. Another maxim is that state control of local matters must yield when the exercise of that control would be a burden upon interstate commerce. It is in this phase—intermingling and overlapping—when the line sometimes becomes fuzzy and judicial interpretation becomes essential.

The extent, if any, to which states may exercise power over matters of commerce in a given circumstance does not admit of measurement by slide rule tactics. In each instance all of the factors must be weighed and the overall picture surveyed. The point was well expressed by Mr. Justice Black in *Hines v. Davidowitz,* 312 U. S. 52:

> "There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of State laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions; conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." pp. 67-8.

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> "The nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law, are all important in considering the question of whether supreme federal enactments preclude enforcement of state laws on the same subject." p. 70.

The same principle—lack of a formula—applies when a state act intrudes on a United States constitutional provision absent legislative implementation. This language was used by Mr. Justice Reed in *Morgan v. Commonwealth of Virginia*, 328 U. S. 373:

> "The precise degree of a permissible restriction on state power cannot be fixed generally or indeed not even for one kind of state legislation, such as taxation or health or safety. There is a recognized abstract principle, however, that may be taken as a postulate for testing whether particular state legislation in the absence of action by Congress is beyond state power. This is that the state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose. Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation. Too true it is that the principle lacks in precision. Although the quality of such a principle is abstract, its application to the facts of a situation created by the attempted enforcement of a statute brings about a specific determination as to whether or not the statute in question is a burden on commerce. Within the broad limits of the principle, the cases turn on their own facts.
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> "In the field of transportation, there have been a series of decisions which hold that where Congress has not acted and although the state statute affects interstate commerce, a state may validly enact legislation which has predominantly only a local influence on the course of commerce. It is equally well settled that, even where Congress has not acted, state legislation or a final court order is invalid which materially affects interstate commerce." pp. 377-9.

First, Appellant will show that there is merit to the legal argument that by the Civil Aeronautics Act Congress pre-empted the entire field of commercial air transportation regulation, both safety and economic. Next, Appellant will show that even though the Civil Aeronautics Act should be held not to occupy the field, sound merit exists in the legal argument that the commerce clause of the United States Constitution of itself bars interference by the states.

B. The Argument That the Civil Aeronuatics Act Preempts the Field of Commercial Air Transportation Has Merit.

1. Lack of Specific Language in the Act Is Immaterial.

At the outset it is admitted that the Civil Aeronautics Act contains no direct language that the Civil Aeronautics Board has exclusive control of either the safety factors or the economic factors pertaining to air transportation. Nor does the Act provide in so many words that the states shall not interfere.

Appellee has conceded that the Civil Aeronautics Act occupies the entire field of *safety* with respect to air transportation with this declaration in its Statement in Opposition:

> "A review of the definition of 'air commerce' and the safety provisions of the Civil Aeronautics Act clearly demonstrates that the Congress knows how to use language to extend federal regulation to intrastate activities when it desires to do so."

The concession of Appellee is commendable. It is believed, however, that this concession is based more on

the fact that "under the circumstances of this particular case, (California's) law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" concerning safety regulation in air transportation, to paraphrase the *Hines* case, rather than on the language used by Congress in the Civil Aeronautics Act.

The absolute necessity of having a single master with respect to safety regulations in air transportation—far and above any form of ground transportation—is so overwhelmingly manifest that no matter what language might have been used in the Civil Aeronautics Act no one would be heard to argue that the several states could exercise independent control over safety regulations of intrastate air transportation. If each state established its own levels at which aircraft could fly when on instruments, there would be no blind flying. There is no need to multiply this example.

If this Court were called upon to consider the validity of a state law impinging on the exclusiveness of the Board's control of safety matters in air transportation, every expression noted in the *Hines* case—conflicting, contrary to, repugnance, irreconcilability and interference, to state five of the ten—could be employed. Nonetheless, the language in the Act with respect to pre-emption of the field of safety is by no means as convincing or compelling as the circumstances themselves.

Section 601(a) of the Act (49 U. S. Code 551) reads in part:

> "The Board is empowered, and it shall be its duty to promote safety of flight in air commerce by prescribing and revising from time to time—"

various safety standards and rules which are quite all-embracing. This power is confined to flight in air commerce.

Section 1(3) of the Act (49 U. S. Code 401(3)), defines air commerce in this manner:

> "'Air commerce' means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce."

Mail is carried by air between points in a single state —Los Angeles to San Francisco, for example. Operation of an aircraft within the limits of any civil airway may be entirely within a single state—again Los Angeles to San Francisco, for example. Careless operation of an aircraft flying between Los Angeles and San Francisco might endanger the safety of an interstate flight between Los Angeles and Seattle. So Congress must have, and if it did not it should have, intended to exclude states from interfering with safety matters in any form of air transportation. But Congress did not say so in so many words.

The difference between the words used in the Act respecting safety factors and those used respecting economic factors is very thin and far from sufficient to hold categorically, as Appellee concedes, that safety matters have been pre-empted, but that, as Appellee contends, economic matters have not been.

Section 403(a) of the Act (49 U. S. Code 483(a)), provides that every air air carrier shall file with the Board

tariffs showing all rates for "air transportation" between points served by it. Section 1(10) of the Act (49 U. S. Code 401(10)) reads: "'Air transportation' means interstate, overseas or foreign air transportation or the transportation of mail by aircraft." Section 1(21) defines "interstate air transportation" as the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft in commerce between a place in one state to a place in another state, among other combinations. These words standing alone and strictly construed could be held to exclude intrastate operations. But a broader analysis produces an entirely different reflection on the Congressional intent.

Section 403(a) requires that the tariffs show all rates for air transportation between points served by the carrier. This means all points, not just those that are interstate. Section 403(b) provides that no air carrier shall charge "different compensation for air transportation, *or for any service in connection therewith,* than the rates . . . specified in its currently effective tariffs;". Even though it could be argued that the "points" referred to in Section 403(a) were intended to be interstate only, intrastate air transportation by an interstate air carrier necessarily is "service in connection" with interstate air transportation.

There is no possibility of reading into Section 403 any conclusion other than the conclusion that Congress intended to vest in the Civil Aeronautics Board complete control over the tariffs of air carriers. There is no room for serious contention that Congress intended to leave to the several states the power to determine what tariffs

interstate air carriers should charge for air transportation between points located within the borders of a single state.

Section 401 of the Act (49 U. S. Code 481) covers the issuance, modification, suspension, revocation, transfer and abandonment of Certificates of Public Convenience and Necessity for air routes. Subsection (f) of that section states that "Each certificate under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered." Though the term "air transportation" is used, this declaration necessarily must give the Board control over intrastate segments of the certificates as it is doubted that a single domestic interstate certificate has been issued by the Board under the Act which does not contain at least one intrastate segment.

If the certificates issued by the Board do not confer upon the carrier the right to serve the traffic between intermediate points which are located within a single state, the value to the public of the certificate would be reduced sharply and the Board's power to compel the carrier to provide safe and adequate service at just and reasonable rates (49 U. S. Code 484) would be minimized considerably.

So it is that Section 407 of the Act relating to accounts, records and reports, Section 408 relating to consolidations and mergers, and Section 412 relating to pooling and other agreements would be stripped of vitality if they applied only to the strictly interstate operations of air carriers.

It is not necessary that the Civil Aeronautics Act in so many words recite that it is all-embracing to the exclu-

sion of state interference. Mr. Chief Justice Marshall had this to say in *Sturges v. Crowninshield,* 17 U. S. 122:

> "Whenever the terms in which a power is granted to Congress, or the nature of the power, required that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it." p. 193.

Equally effective language was used by Mr. Justice Jackson in *Bethlehem Steel v. New York Labor Relations Board,* 330 U. S. 767, in which these statements appear:

> "Our question is primarily one of the construction to be put on the Federal Act. It long has been the rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting. *Napier v. Atlantic Coast Line R. Co.,* 272 U. S. 605, 71 L. ed. 432, 47 S. Ct. 207.
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> "In determining whether exclusion of state power will or will not be implied, we well may consider the respective relation of federal and state power to the general subject matter as illustrated by the case in hand. These companies are authorized to do business in New York State, they operate large manufacturing plants in that state, they draw their labor supply from its residents, and the impact of industrial strife in their plants is immediately felt by state police, welfare and other departments. Their labor relations are primarily of interest to the state,

are within its competence legally and practically to regulate, and until recently were left entirely to state control. Thus, the subject matter is not so 'intimately blended and intertwined with responsibilities of the national government' that its nature alone raises an inference of exclusion. *Cf. Hines v. Davidowitz,* 312 U. S. 52, 66, 85 L. ed. 581, 586, 61 S. Ct. 399.

"Indeed, the subject matter is one reachable, and one which Congress has reached, under the federal commerce power, not because it is interstate commerce but because under the doctrine given classic expression in the Shreveport Case, *Congress can reach admittedly local and intrastate activities 'having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.'* " pp. 772-3.

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"However, the power of the state may not so deal with matters left to its control as to stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' . . . When Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, might preclude any state action if it is clear that Congress has intended no regulation except its own . . ." p. 773.

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2. COMMINGLING OF INTRASTATE AND INTERSTATE MATTERS DOES NOT PRECLUDE EXCLUSIVE FEDERAL CONTROL.

The fact that there is a commingling of intrastate and interstate transactions in no wise detracts from the Board's exclusive power. In fact, there are but few interstate activities that are completely divorced from some intrastate functions. If the intrastate activities can be segregated from the interstate activities, and if the intrastate activities do not impede the interstate functions, dual controls are permissible. But when the commingling cannot be unraveled, or when state control of the intrastate transactions will trespass on Federal control of the interstate transactions, state control must yield.

Mr. Justice Hughes had this to say on the point in *Houston East and West Texas Railway v. U. S.*, 234 U. S. 342:

> "It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several states. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local government. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation, and to provide the necessary basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating state legislation.' By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that

arise, and to protect the national interest by securing the freedom of interstate commercial intercourse from local control." pp. 350-351.

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"The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter, or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field." pp. 351-352.

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"We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms. *That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil, is undeniable;* and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with

interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflect injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a state may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden." p. 354.

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"We are not unmindful of the gravity of the question that is presented when state and Federal views conflict. But *it was recognized at the beginning that the nation could not prosper if interstate and foreign trade were governed by many masters,* and, where the interests of the freedom of interstate commerce are involved, the judgment of Congress and of the agencies it lawfully establishes must control." p. 360.

Added force to the argument that the Civil Aeronautics Act precludes state interference is found in the words of Mr. Chief Justice Hughes reported in *Currin v. Wallace,* 306 U. S. 1:

"The fact that intrastate and interstate transactions are commingled on the tobacco market does not frustrate or restrict the congressional power to protect and control what is committed to its own care. . . . Here, the transactions on the tobacco market were conducted indiscriminately at virtually the same time, and in a manner which made it necessary, if the congressional rule were to be applied, to make it govern all the tobacco thus offered for sale." p. 11.

The special circumstances attending the air transportation industry coupled with the wording of the Civil Aeronautics Act bring these cases into play. It cannot be said with conviction that Appellant's legal argument that the Civil Aeronautics Act occupies the entire field of commercial air transportation—economic as well as safety—is lacking in merit.

Certainly it cannot be claimed that the point here contended for by Appellee is so clear that this case should be dismissed or affirmed in summary fashion. The air transportation industry is entitled to a decision of this Court resolving the issue one way or another with sufficient clarity and preciseness to enable the members of the industry to plan their operations with knowledge of the circumstances, if any there be, under which orders of state agencies must be obeyed and conflicting orders of the Civil Aeronautics Board may be ignored with impunity.

C. The Argument That the Commerce Clause of the United States Constitution, Without Aid From the Civil Aeronautics Act, Excludes Any State Control Over Air Carriers Has Merit.

It is not conceded for an instant that the Civil Aeronautics Act has not pre-empted the entire field of air transportation. But should it be the ruling of this Court that Congress did not intend the Civil Aeronautics Act to pre-empt the field, then the commerce clause of itself establishes the needed barrier against state intervention.

The Federal Government has exclusive control over interstate commerce. States may not impose burdens on this commerce whether or not Congress has chosen to speak.

Mr. Justice Sutherland in *Missouri ex rel. Barrett v. Kansas National Gas Co.*, 265 U. S. 298, upholds Mr. Justice Hughes' words in the *Minnesota Rate Cases* in this language:

> "In Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 396, 57 L. ed. 1511, 1540, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18, Mr. Justice Hughes, speaking for the court, said: 'If a state enactment imposes a *direct burden* upon interstate commerce, it must fall, regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the State has directly restrained that which, in the absence of Federal regulation, should be free.' The question is so fully discussed in that case that nothing beyond its citation is required." pp. 307-8. (Emphasis included.)

More recently Mr. Chief Justice Stone in *Southern Pacific Company v. Arizona*, 325 U. S. 761, confirmed the principle in this language:

> "But ever since Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. Ed. 23, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, *or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.* Cooley v. Port Wardens, *supra* (12 How. (U. S.) 319, 13 L. ed. (1004); Leisy v. Hardin,

135 U. S. 100, 108, 109, 34 L. ed. 128, 132, 10 S. Ct. 681, 3 Inters Com. Rep. 36; Minnesota Rate Cases (Simpson v. Shepard) *supra* 230 U. S. 399, 400, 57 L. ed. 1541, 1542, 33 S. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A 18); Edwards v. California, 314 U. S. 160, 176, 86 L. ed. 119, 126, 62 S. Ct. 164. Whether or not this long recognized distribution of power between the national and the state governments is predicated upon the implications of the commerce clause itself, Brown v. Maryland, 12 Wheat. (U. S.) 419, 447, 6 L. ed. 678, 688; Minnesota Rate Cases (Simpson v. Shepard) *supra* (230 U. S. 399, 400, 57 L. ed. 1541, 1542, 33 S. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A 18); Pennsylvania v. West Virginia, 262 U. S. 553, 596, 67 L. ed. 1117, 1132, 43 S. Ct. 658, 32 A. L. R. 300; Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511, 522, 79 L. ed. 1032, 1037, 55 S. Ct. 497, 101 A. L. R. 55; South Carolina State Highway Dept. v. Barnwell Bros. *supra* (303 U. S. 185, 82 L. ed. 738, 58 S. Ct. 510); or upon the presumed intention of Congress, where Congress has not spoken, Welton v. Missouri, 91 U. S. 275, 282, 23 L. ed. 347, 350; Hall v. De Cuir, 95 U. S. 485, 490, 24 L. ed. 547, 548; Brown v. Houston, 114 U. S. 622, 631, 29 L. ed. 257, 260, 5 S. Ct. 1091; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 481, 482, 31 L. ed. 700, 705, 706, 8 S. Ct. 689, 1062, 1 Inters. Com. Rep. 823; Leisy v. Hardin, *supra* (135 U. S. 109, 34 L. ed. 132, 10 S. Ct. 681, 3 Inters. Com. Rep. 36); Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 559, 560, 35 L. ed. 572, 575, 576, 11 S. Ct. 865; Bren-

nan v. Titusville, 153 U. S. 289, 302, 38 L. ed. 719, 723, 14 S. Ct. 829, 4 Inters. Com. Rep. 658; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 212, 38 L. ed. 962, 966, 14 S. Ct. 1087, 4 Inters. Com. Rep. 649; Graves v. New York, 306 U. S. 466, 479, note, 83 L. ed. 927, 932,note, 59 S. Ct. 595, 120 A. L. R. 1466; Dowling, Interstate Commerce and State Power, 27 Va. L. Rev. 1, the result is the same." pp. 767-8.

"For a hundred years it has been accepted constitutional doctrine that the commerce clause, with out the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests. Cooley v. Port Wardens, 12 How. (U. S.) 299, 13 L. ed. 996, *supra;* Kansas City Southern R. Co. v. Kaw Valley Drainage Dist. 233 U. S. 75, 79, 58 L. ed. 857, 859, 34 S. Ct. 564; South Covington & C. Street R. Co. v. Covington, 235 U. S. 537, 546, 59 L. ed. 350, 353, 35 S. Ct. 158, L. R. A. 1915F 792, P. U. R. 1915A 231; Missouri, K. & T. R. Co. v. Texas, 245 U. S. 484, 488, 62 L. ed. 419, 421, 38 S. Ct. 178, L. R. A. 1918C 535, P. U. R. 1918B 602; St. Louis & S. F. R. Co. v. Public Serv. Commission, 254 U. S. 535, 537, 65 L. ed. 389, 391, 41 S. Ct. 192, P. U. R. 1921B 504; Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1, 10, 73 L. ed. 147, 152, 49 S. Ct. 1; Gwin, White & Prince v. Henneford, 305 U. S. 434, 441, 83 L.

ed. 272, 277, 59 S. Ct. 325; McCarroll v. Dixie Greyhound Lines, 309 U. S. 176, 84 L. ed. 683, 60 S. Ct. 504." p. 769.

The very nature of air transportation, relatively new, fast and fast growing, requires the removal of all needless impediments to the free flow of its operations. Even though Congress had remained silent forty-eight different sets of safety regulations for air transportation would be an impossible burden on interstate commerce by air. Forty-eight conflicting sets of economic regulations would make it just as impossible for air carriers to conduct an efficient and safe air transportation system in interstate commerce.

But Congress has spoken wisely and effectively by means of the Civil Aeronautics Act. So speculation need not be indulged concerning what might have happened to the still young but important air transportation industry had there not been a central guide.

The Civil Aeronautics Board has proved its ability to guide and control the air transportation industry and the states have recognized that at least there was grave doubt about their right to interfere in any phase of the industries operations, otherwise this case would not be the test case on the subject.

Clearly, the argument that the commerce clause will not brook interference by the states with the operations of air carriers, regardless of any limitations in the Civil Aeronautics Act, has ample merit to invite the attention of this Court.

Conclusion.

The issues raised by this appeal are more than substantial, they are crucial to the well-being of the American flag air transportation industry and to the flying public.

The legal arguments which will be made in support of Appellant's claim that the Civil Aeronautics Act has preempted the entire field and that even without the benefit of that Act the commerce clause of the United States Constitution bars all significant state interference are sufficiently sound to justify a denial of Appellee's motion to dismiss or affirm.

Los Angeles, California.
December 3, 1951.

Respectfully submitted,

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Certificate of Service.

I, George G. Gute, an associate of the firm of Guthrie, Darling & Shattuck, attorneys for Appellant Western Air Lines, Inc., certify that on this date I will have caused to be mailed copies of the within Brief to Everett C. McKeage, Esquire, General Counsel for Appellee Public Utilities Commission of the State of California, with postage prepaid, addressed to 514 State Building, San Francisco 2, California.

Los Angeles, California.
December 3, 1951.

GEORGE G. GUTE